ARAB-MALAYSIAN FINANCE BHD

v.

BORNEO WOOD (SABAH) SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: D5-22-1110-1997]
26 NOVEMBER 2007

HIRE PURCHASE: *Agreement - Formalities - Whether valid hire purchase agreement in force - Whether a valid hire purchase transaction arises where there is no reservation of property and title - Property and title in a hire purchase transaction does not pass to hirer at beginning of transaction - Hirer only given option to purchase upon full payment of instalments - Hire-purchase agreement should only contain one good and not three goods cumulatively - Transaction between plaintiff and 1st defendant not hire-purchase transaction but loan secured upon Bill of Sale*

HIRE PURCHASE: *Agreement - Breach - Failure to pay instalments - Termination of Agreement - Whether plaintiff entitled to claim arrears of instalments due at point of termination or all instalments due under Agreement - Transaction between plaintiff and 1st defendant not hire-purchase transaction but loan secured upon Bill of Sale - Liability of guarantor - Whether defendants liable as guarantors and indemnors - Claim against guarantors for whole outstanding amount pre-mature and must fail - No proper termination of the hire purchase agreement - Terms of alleged hire purchase agreement substantially varied by plaintiff without consent of guarantors - Guarantors discharged of their liability under letter of guarantee*

The 1st defendant purchased several machineries from Kimanis Bay Timbers Sdn Bhd (Kimanis), evidenced by an invoice dated 21 August 1995. The subject machineries became the subject matters of the two alleged HP Agreements entered into between the 1st defendant and the plaintiff. The subject machineries were delivered and duly installed at the 1st defendant's factory before the alleged HP Agreements were entered into. By a notice of demand dated 23 September 1997, the plaintiff demanded from the 2nd and 3rd defendants, as Guarantors, payment of the instalments in arrears and stipulated therein that unless such arrears were settled, the two (2) alleged HP Agreements "shall be deemed terminated". The subject machineries under the HP Agreements were not repossessed. Writ of summons was then taken up by the plaintiff for the whole outstanding amount under the alleged HP Agreements. Before the Writ was served on the 2nd and 3rd defendants, the plaintiff issued the further notices of termination to the 2nd and 3rd defendants. The writ of summons and the statement of claim were also amended twice

by the plaintiff subsequent to which further notices of termination were issued. The 2nd and 3rd defendants averred, *inter alia*, that: (i) the transaction between the plaintiff and the 1st defendant was not hire a purchase transaction but was a loan transaction secured upon a Bill of Sale and, accordingly, the consideration for giving the guarantee failed; (ii) the terms of the alleged HP Agreements had been substantially varied without the Guarantors' consent thereby discharging them of their liability under the Guarantee; (iii) there was no proper termination of the alleged HP Agreements and, accordingly, the plaintiff's claim was premature.

Held (dismissing the plaintiff's claim against the 2nd and 3rd defendants with costs):

(1) For a transaction to qualify as a hire-purchase transaction, it necessitates that "property and title" of the subject good would never pass to the hirer at the beginning of the transaction. The "property and title" are retained by the financier and the hirer is only given an option to purchase the subject good upon full payment of the instalments stipulated thereunder. (para 19)

(2) There was absolutely no reservation of "properties and titles" in the invoice dated 21 August 1995. In the circumstances, with the delivery and installation of the subject machineries at the 1st defendant's factory, it was clear that "properties and titles" of the subject machineries would have passed to the 1st defendant on 21 August 1995. Since "properties and titles" to the subject machineries had already passed to the 1st defendant on 21 August 1995 before the signing of the alleged HP Agreements, the transaction between the plaintiff and the 1st defendant could not have been hire-purchase transaction. (paras 22, 23 & 27)

(3) A genuine hire-purchase agreement should only contain one good and not three goods cumulatively for otherwise, the hirer will be deprived of the option to purchase the goods item by item rather than cumulatively. (para 38)

(4) Since the transaction between the plaintiff and the 1st defendant were not hire-purchase transaction but a loan secured upon a Bill of Sale, the consideration given by the 2nd and 3rd defendants for the guarantee had failed and therefore ought to be discharged of their liabilities thereunder. (para 41)

(5) In any event, the plaintiff's claim against the 2nd and 3rd defendants, as guarantors, for the whole outstanding amount was pre-mature and must fail as the alleged HP Agreements were not properly terminated by the plaintiff before commencement of the

action. There was no repossession of the subject machineries. Further, the words "deemed terminated" in the notice of demand could not have been an "unequivocal declaration" of termination of the HP Agreements. Even if the notice dated 23 September 1997 amounted to a declaration, it had been waived by subsequent notices. (para 42)

(6) Since there was no proper termination of the alleged HP Agreements, the plaintiff was only entitled to claim for the arrears in instalments. There could have been no proper demand for the whole amount under the alleged HP Agreements against the 2nd and 3rd defendants, as guarantors. (para 63)

(7) The terms of the alleged HP Agreements had been substantially varied by the plaintiff without the consent of the 2nd and 3rd defendants, as guarantors, with the result that the 2nd and 3rd defendants were discharged of their liability under the letter of guarantee. (para 66)

Case(s) referred to:

Anglo-American Corp Ltd v. Goodwood Sawmill Company [1966] 1 LNS 10 HC ***(refd)***

BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal [2000] 2 CLJ 197 CA ***(refd)***

Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua Ors [1990] 1 CLJ 687; [1990] 1 CLJ (Rep) 141 SC ***(refd)***

Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(refd)***

Siew Nguong Hin & Ors v. Mayban Finance Bhd, High Court, Penang Originating Summons No. 24-864-91 (Unreported) ***(refd)***

Tan Tien Choy v. Kiaw Aik Hang Co Ltd [1965] 1 LNS 182 FC ***(refd)***

United Engineers (Malaysia) Ltd. v. Lai Ping Yoon [1967] 1 LNS 200 HC ***(refd)***

Legislation referred to:

Bills of Sale Act 1950, s. 3(1)
Bills of Sale Ordinance 1936 (Sabah), s. 2
Hire-Purchase Act 1967, s. 4D
Sale of Goods Act 1957, s. 20

For the plaintiff - Normaslina Abdul Fuad; M/s BH Gan Nor & Kim
For the 2nd & 3rd defendant - WJ Chen; M/s WJ Chen & Co

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali J:

Plaintiff's Claim

[1] The plaintiff's claim is for the total outstanding amount under two alleged Hire-Purchase Agreements (HP Agreements) both dated 12 February 1996.

[2] The 2nd and 3rd defendants were guarantors for the alleged HP Agreements pursuant to two letters of guarantee both dated 12 February 1996.

[3] The 1st defendant, Borneo Wood (Sabah) Sdn Bhd was wound up on 16 August 2002 and the plaintiff had withdrawn its claim on 7 December 2006 against the 1st defendant due to its winding-up status. The trial was only proceeded with against the 2nd and 3rd defendants who are the guarantors to the 1st defendant.

Defendants' Defence

[4] The 2nd and 3rd defendants aver that:

(a) the transaction between the plaintiff and the 1st defendant were not hire purchase transactions as alleged or at all but were loan transaction secured upon Bills of Sale and, accordingly, the consideration for giving the guarantee failed;

(b) further or alternatively, the terms of the alleged HP Agreements had been substantially varied without the guarantors' consent thereby discharging them of their liability under the guarantee;

(c) alternatively, there was no proper termination of the alleged HP Agreements and, accordingly, the plaintiff's claim in this action is premature and also for a sum not due to it; and

(d) there being no offer of the subject machineries to the 2nd and 3rd defendants as guarantors, the condition precedent for suing the 2nd and 3rd defendants was not fulfilled before the commencement of this action.

The Facts

[5] The 1st defendant purchased three units of Ponysaw and one unit of Resaw along with other machineries from a company identified as "Kimanis Bay Timbers Sdn Bhd" evidenced by an invoice dated 21 August 1995.

[6] The subject machineries become the subject matters of the two alleged HP Agreements both dated 12 February 1996 entered into between the 1st defendant and the plaintiff. A

[7] Before the material time of entering into the alleged HP Agreements on 12 February 1996, the subject machineries were delivered and duly installed at the 1st defendant's factory. B

[8] By a notice of demand dated 23 September 1997 issued by the plaintiff's solicitors, the plaintiff demanded from the 2nd and 3rd defendants, as guarantors, payment of the instalments in arrears amounting to a total sum of RM181,709.37 and stipulated therein that unless such arrears were settled, the two alleged HP Agreements "shall be deemed terminated". C

[9] The subject machineries under the HP Agreements were not repossessed by the plaintiff nor were they returned by the 1st defendant. There was also no offer by the plaintiff to the 2nd and 3rd defendants (as guarantors) to purchase the subject machineries. D

[10] Writ of summons was taken up by the plaintiff on 29 October 1997 for the whole outstanding amount under the alleged HP Agreements. Before the writ was served on the 2nd and 3rd defendants, the plaintiff issued the following further notices to the 2nd and 3rd defendants: E

(a) Notice of termination dated 1 January 1998 in respect of the 1st Hire-purchase Agreement; F

(b) Notice of termination dated 1 January 1998 in respect of the 2nd Hire-purchase Agreement.

[11] The writ of summons dated 29 October 1997 and the statement of claim was then amended by the plaintiff first on 6 January 1998 in light of payment by the 1st defendant. The amended writ and amended statement of claim dated 6 January 1998 was served on the 2nd defendant but not on the 3rd defendant. G

[12] On 20 April 1998, the amended writ and amended statement of claim was further amended in light of payment by the 1st defendant. H

[13] Before the further amended writ and further amended statement of claim dated 20 April 1998 was served on the 3rd defendant, the plaintiff again issued the following further notices:

(a) Notice of termination dated 14 May 1998; and I

(b) Notice of termination dated 14 May 1998.

[14] After service of the further amended writ of summons on the 3rd defendant, the plaintiff further issued the following notices:

(a) Notice of termination dated 21 August 1998.

(b) Letter dated 25 August 1998 demanding for payment of arrears and threatening legal action.

[15] By two statements of account both dated 22 October 1997 issued by the plaintiff itself, rebates were given by the plaintiff, namely in respect of the alleged 1st HP Agreement, the sum of RM4,755.40, and in respect of the alleged 2nd HP Agreement, the sum of RM42,798.64.

[16] By two subsequent statements of account both dated 25 March 1999 also issued by the plaintiff, both the rebates as shown in the earlier statements of account dated 22 October 1997 were taken out by the plaintiff with the express written statement "(Agmt expired on 12 February 1999, therefore no rebate given)".

[17] The further amended writ was never served on the 2nd defendant.

Findings Of Court

[18] The subject matter of the plaintiff's claim against the defendants is based on two alleged hire-purchase agreements (HP Agreements) both dated 12 February 1996. Therefore it is vital in the first place for the court to determine whether the said transaction is actually hire-purchase transaction. If the transaction is not hire-purchase transaction, then the plaintiff's claim against the defendants would fail.

[19] For a transaction to qualify as a hire-purchase transaction, it necessitates that "property and title" of the subject good would never pass to the hirer at the beginning of the transaction. The "property and title" are retained by the financier and the hirer is only given an option to purchase the subject good upon full payment of the instalments stipulated thereunder.

[20] A hire-purchase agreement is more than a simple contract of hire for it confers upon the hirer an option to purchase the goods. In the case of *United Engineers (Malaysia) Ltd. v. Lai Ping Yoon* [1968] 1 MLJ 189, the court held:

> A contract where the property passes at once but the price is payable by instalments is clearly a credit sale. A hire-purchase agreement is more than a simple contract of hire, for it confers upon the hirer an option to purchase the goods ... The importance of the option to purchase lies in the fact that the hirer is unable to pass a good title to a third party, because he is not a person who has bought or agreed to buy the goods. Since the property in the goods remains in the owner

who lets them on hire, the retention of the ownership of the goods and the inability of the hirer (except in special circumstances) to pass a good title provide the owner with some measure of security in case of the hirer defaults. The hirer, on the other hand, obtains the benefit of a credit transaction in that he receives the possession and use of the goods in advance of the payment of the price, and is enabled to purchase the goods once the price has been paid.

[21] In the present case, the evidence adduced during the trial are as follows:

(a) there was an invoice dated 21 August 1995 issued by Kimanis Bay Timbers Sdn Bhd, the Seller, to the 1st defendant, the alleged Hirer, in respect of the sale of the subject machineries;

(b) while PW1 averred that the invoice dated 21 August 1995 was merely a "quotation" and not an invoice of sale *per se*, PW3 had during cross-examination confirmed that it was "an invoice – not a quotation" and it was addressed to the 1st defendant;

(c) PW1 conceded during cross-examination that she had "no personal knowledge about the transaction" and her "knowledge is based on records of the plaintiff";

(d) PW3, on the other hand, was the branch manager of the plaintiff at the material time of the alleged HP transactions who in fact "made the letter of offer dated 19 December 1995" for the alleged HP transactions and, accordingly, had personal knowledge of the transaction;

(e) PW3 confirmed that the invoice dated 21 August 1995 involved other goods sold and not merely the subject machineries; and

(f) PW3 further confirmed that, while he did not inspect the subject machineries personally at the time of the alleged HP transactions, from the contemporaneous report and photographs taken by his officer who conducted the inspection at the 1st defendant's factory which he had sighted at the material time, the subject machineries "were installed at the defendant's factory".

[22] It is pertinent to note at this juncture that there was absolutely no reservation of "properties and titles" in the invoice dated 21 August 1995.

[23] In the circumstances, with the delivery and installation of the subject machineries at the 1st defendant's factory, it is clear that "properties and titles" of the subject machineries would have passed to the 1st defendant on 21 August 1995.

[24] Section 20, Sale of Goods Act, 1957, provides as follows:

> 20. Specific goods in a deliverable state.
>
> Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed.

[25] In *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal* [2000] 2 CLJ 197 the Court of Appeal ruled as follows:

> In the absence of a contrary intention, property in specific goods passes to the buyer at the time the contract is made. And it matters not whether the parties have postponed either payment for, or delivery of, the goods.

[26] In any event, both the defence witnesses, DW1 and DW2, had testified that payment for the invoice dated 21 August 1995, was fully made by the 1st defendant by way of "off-setting supply of sawn timber".

[27] Since "properties and titles" to the subject machineries had already passed to the 1st defendant on 21 August 1995 before the signing of the alleged HP Agreements both dated 12 February 1995, the court is of the view that the transaction between the plaintiff and the 1st defendant could not have been hire-purchase transaction.

[28] In *Tan Tien Choy v. Kiaw Aik Hang Co Ltd* [1965] 1 LNS 182 the Federal Court ruled as follows:

> In fact, although the second agreement is in the form of a hire-purchase agreement, it was a document to secure payment of the further advance and the balance that had not been paid in cash under the first agreement. Its real purpose was not, therefore, to effect a sale of the car by way of hire-purchase, for ownership of the car had already passed to the appellant. Its real purpose was to create a security over the car for the payment of money. The court must take into account the real nature of this agreement to determine the true rights and interests of the parties …
>
> Nevertheless, the true nature of the transaction, as disclosed by this analysis, remains the test by which the rights of the parties to it must be determined. In my judgment, the agreement of 9 March 1960 was in reality an assurance of chattels to secure payment of the whole amount then owing to the respondent, given by the appellant as the then owner in favour of the respondent. As the agreement is void in respect of the chattel concerned, it follows that the ownership of the car remains with the appellant.

[29] By s. 2 of the Bills of Sale Ordinance, 1936, (Sabah), a bill of sale is defined as "an instrument in writing whereby in order to secure the payment of money one transfers to another the property he has in personal chattels, used in cases where possession is not intended to be given ..." A

B

[30] In the present case, although the subject transactions took place in Sabah, both the agreements: Exhibits "P10A" and "P10C" contained the following provisions:

> 23. PLACE OF CONTRACT: This Agreement shall be deemed to have been made in the State or Territory in which the Owner has its registered office ... C

[31] It is indisputable fact that the registered office of the plaintiff is in Kuala Lumpur and, accordingly, the provisions of the Bill of Sale Act, 1950, (West Malaysia) are relevant.

D

[32] By s. 3(1) of the Bills of Sale Act, 1950, (West Malaysia), while "bill of sale" is similarly defined as in s. 2 of the Bills of Sale Ordinance, 1936, (Sabah), "personal chattels" are defined to include "goods, furniture and other articles capable of complete transfer by delivery, and trade machinery ..." E

[33] From the above, the court finds that the transaction between the plaintiff and the 1st defendant were in actual fact loan transactions secured upon bill of sale of the subject machineries but disguised as hire-purchase transaction.

F

[34] The finding that they were loan transactions secured upon bill of sale but disguised as hire-purchase transactions can be fortified by the fact that a 2nd invoice dated 2 February 1996 was issued by Kimanis Bay Timber Sdn Bhd in respect of the same subject machineries.

[35] In respect of this 2nd invoice, PW3 testified to the effect that "These are 2nd invoice dated 2 February 1996 issued by Kimanis Bay Timber Sdn Bhd. This invoice was addressed direct to plaintiff. This was issued after letter of offer dated 19 December 1995. We disbursed the loan based on this 2nd invoice." G

H

[36] While PW3 initially disagreed when put to question by testifying that "it is not correct that the 2nd invoice was issued at a request.", upon further cross-examination, PW3 finally conceded that "We request the supplier to issue us the invoice. This is a normal procedure. We requested the supplier to issue the 2nd invoice."

I

[37] The finding that the transaction between the plaintiff and the 1st defendant was not in fact hire-purchase transaction can further be fortified by the indisputable fact that, in the agreement marked as exh. "P10C", the subject machineries were expressly stated as "Three units of Ponysaw" each bearing a different serial number and of different models.

[38] A genuine hire-purchase agreement should only contain one good and not three goods cumulatively as in exh. "P10C" for otherwise, the hirer will be deprived of the option to purchase the goods item by item rather than cumulatively.

[39] Section 4D, Hire-Purchase Act, 1967, reads as follows:

> (1) There shall be a separate hire-purchase agreement in respect of every item of goods purchased under this Act;
>
> (2) A hire-purchase agreement that does not comply with sub-section (1) shall be void.

[40] While the subject machineries were not within the ambit of the Hire-Purchase Act, 1967, the Act, is nonetheless a codification of the relevant common laws in the material aspect and, thus, a genuine HP Agreement should concern only one good and not three goods cumulatively.

[41] Since the transaction between the plaintiff and the 1st defendant was not hire-purchase transaction but loan secured upon bill of sale, the court rules that the consideration given by the 2nd and 3rd defendants for the guarantee had failed and the 2nd and 3rd defendants ought to be discharged of their liabilities thereunder.

[42] Further, even if the transaction was not loan secured upon bill of sale, the plaintiff's claim against the 2nd and 3rd defendants, as guarantors, for the whole outstanding amount is pre-mature and must fail as the alleged HP Agreements were not properly terminated by the plaintiff before commencement of the action. Since the alleged HP Agreements were not properly terminated, there could be no proper demand made on the 2nd and 3rd defendants, as guarantors, for the whole outstanding amount under the alleged HP Agreements. Accordingly, the plaintiff's claim against the 2nd and 3rd defendants for the whole outstanding amount and not merely the arrears in instalments must fail.

[43] In *Anglo-American Corp Ltd v. Goodwood Sawmill Company* [1966] 1 LNS 10, the court ruled in respect of termination of a HP Agreement as follows:

> Where a notice to the hirer may be said to be an implied term of the agreement, in my judgment, all that is necessary is for the owner to make a declaration or to do some unequivocal act amounting to such a declaration of his intention to terminate the hiring.
>
> I think I will be right if I go so far as to say that clause 4(a) of the agreement was tantamount to saying that the Plaintiffs may forthwith and without notice or demand terminate the hiring by retaking possession of the property.

[44] It is pertinent to note that, in the present action, while both the alleged HP Agreements contained a clause similar to the "clause 4(a)" referred to in *Anglo-American Corp Ltd v. Goodwood Sawmill Company (supra)*, there was no repossession of the subject machineries and thus there could be no "unequivocal act amounting to such a declaration of his intention to terminate the hiring" in the sense of that case.

[45] The plaintiff merely relied on a demand notice dated 23 September 1997 issued by its solicitors to support its claim that the alleged HP Agreements were terminated. However, the actual words used in the notice were "deemed terminated" if arrears in instalments were not paid. The words "deemed terminated" as used in the notice dated 23 September 1997 could not have been an "unequivocal declaration" of termination of the HP Agreements.

[46] The view that the demand notice dated 23 September 1997 was not an "unequivocal declaration" was fortified by the fact that the demand notice dated 23 September 1997 was superseded by further notices respectively dated 1 January 1998, 14 May 1998, 21 August 1998 and 25 August 1998 all issued by the plaintiff itself to the 2nd and 3rd defendants and all claiming for payment of arrears in instalments and threatening to terminate the alleged HP Agreements.

[47] The words used in each and every of the demand notices are as follows:

> ... please be advised that unless your arrears of RM ... are paid to Arab-Malaysian Finance Berhad within seven (7) days from the date of this notice, we will exercise our rights to terminate the hire-purchase agreement in accordance with the terms of the agreements.
>
> We will resume possession of the goods from that date ...

[48] While the plaintiff attempted to argue that the said demand notices were computer generated and therefore impliedly saying that they are not binding on the plaintiff, PW2 had during cross-examination testified as follows:

> The computer notice will generate automatically. These notices are in standard format as prescribed by the management. We need to operate the computer before the notice were printed out. After that somebody will put the notices in an envelope and sent it out. These notices are printed on the Plaintiff's letter head, I agree that the notices are issued by the Plaintiff.

[49] PW2 then went on to testify as follows:

> Once the management inform us that the loan is terminated and put into the computer, then the default information would automatically removed from the system. If not removed, the system would continue to send reminders if there is default. The loan Department has not informed me that this loan has been terminated at any time. The system has generated numerous notices to Defendant 2 & 3 as generated. All these notices carried the tile "Notice of Termination". Indirectly, we are telling the Defendants that the Plaintiff intended to terminate the HP. At the time of the numerous notices the HP has not been terminated yet. Just the Plaintiff intended to terminate the HP.

[50] In the circumstances, the court is satisfied that, even if the demand notice dated 23 September 1997 amounts to a declaration, it had been waived by the subsequent notices respectively dated 1 January 1998, 14 May 1998, 21 August 1998 and 25 August 1998.

[51] In *Siew Nguong Hin & Ors v. Mayban Finance Bhd, High Court*, Penang Originating Summons No. 24-864-91 (464) MD7, Abdul Hamid J in delivering the judgment of the court held as follows:

> ... by issuing 'the second notice' the Defendant had waived 'the first notice'.

[52] It is pertinent to note at this juncture that the subsequent notices respectively dated 1 January 1998 and 14 May 1998 (pp. 32-35, Bundle B) were issued after the filing of the writ on 29 October 1997 but before service of the writ to the defendants.

[53] It is also pertinent to note that the original writ was never served but was first amended on 6 January 1998 and then again on 20 April 1998 in light of payments by the 1st defendant before it was eventually served on the 2nd and 3rd defendants. Writ summons, although in itself is a demand, is not a demand made until it is duly served on the 2nd and 3rd defendants.

[54] Thus, the 2nd and 3rd defendants, as guarantors, had a legitimate expectation that the demand notice dated 23 September 1997 had been waived and the alleged HP Agreements were still subsisting at all material times.

[55] It must also be noted that the subject machineries under the alleged HP Agreement were never repossessed by the plaintiff or returned by the 1st defendant. There was also no offer made by the plaintiff, as owner, to the 2nd and 3rd defendants, as guarantors to purchase the subject machineries.

[56] The plaintiff had further by its letter dated 25 August 1998 to the 1st defendant clearly stated that the alleged HP Agreements had yet to be properly terminated by the date of commencement of the present action (29 October 1997). The words applied in the said letter in this respect are as follows:

> You would appreciate that despite our indulgence granted, the said facilities have yet to be regularised and moreover your SCB cheque no. 500456 was returned with remarks "Payment Stopped". The abovementioned accounts have since been classified under "NPL" (Non-Performing Loan).
>
> Take Notice That, unless the arrears sum of RM390,840.00 is paid to us on or before 29th August 1998, we shall have no alternative but to proceed with the necessary actions deemed fit in order to protect our interest without any reference to you or the guarantors.

[57] In respect of the content of the said letter, PW3 had duly testified under cross-examination that "I confirm the content of para 4 of the letter. This letter is not handled by me. Based on the record, the arrears sum is RM390,840. Plaintiff is demanding on the arrears sum of RM390,840, not for the entire loan sum, based on this letter. Personally I don't know whether at that time the loan had been recalled or not."

[58] From the above, it is thus clear that the alleged HP Agreements were never properly terminated even as late as 29 August 1998 (after the filing of the present suit on 29 October 1997) and the plaintiff was still demanding for only the arrears of instalments at the material time but not the entire loan amount.

[59] These admissions by the plaintiff through its own witnesses' testimonies, namely PW2 and PW3, given during cross-examination that the alleged HP Agreements were never terminated at the time of the commencement of this action was further collaborated by PW1's testimony as follows:

A

> In every notice the agreement would be terminated in the event the amount is not paid within time. At the date of the notice the agreements have not been terminated yet. It was just a warning first.

[60] Further, by the plaintiff's own statements of account respectively dated 25 March 1999, the plaintiff had clearly written that "Agmt. B expired on 12 February 1999 therefore no rebate given." The subsequent notices respectively dated 1 January 1998, 14 May 1998, 21 August 1998 to the 2nd and 3rd defendants, the letter dated 25 August 1998 to the 1st defendant and statement of account dated 25 March 1999 were clearly expressed statements contrary to any or C any proper termination of the alleged HP Agreements.

[61] Further, it is pertinent to note that the statements of account both dated 25 March 1999 were documents prepared and issued by the plaintiff itself. Towards this end, PW1 testified during cross-examination as follows: D

> These statements of account are dated 25.2.1999. They are prepared by me and one of my colleague. My colleague's handwritten note is there to say that the agreement expired on 12.2.1999. It was written with my agreement. I and my colleague were authorised by Plaintiff to issue the statement of account. When I issued the statement I was in E the course of my duty.

[62] By expressly stating in the statements of account both dated 25 March 1999 that "Agmt. expired on 12 February 1999 therefore no rebate given", the plaintiff was estopped from denying that the alleged F HP Agreements was never terminated but was allowed to expire only on 12 February 1999.

[63] Since there was no proper termination of the alleged HP Agreements, the plaintiff was only entitled to claim for the arrears in instalments. It follows that there could have been no proper demand for G the whole amount under the alleged HP Agreements as claimed in the action particularly against the 2nd and 3rd defendants, as guarantors.

[64] In the words of the Court of Appeal in the case of *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619:

H

> Therefore, since the first defendant did not terminate the agreement, there was no liability of the hirer that was revealed in the statement of claim for the appellant to guarantee or make good. Under the terms of his guarantee, the appellant in no circumstances was under any liability to do so.

I

> In the present case, as the hire-purchase agreement was still subsisting since the Plaintiff did not determine it (under s 40 of the Contract Act) or repossess the bus (under s. 16 of the Hire-purchase Act) nor did the first Defendant return it to the Plaintiff (under s 15 of the same

> Act), the Plaintiff still has the right to recover instalments due under the agreement. Unfortunately for the Plaintiff, there was no claim for arrears of instalments in its statement of claim. Therefore, as the Plaintiff did not claim for arrears of instalments against the first Defendant, there was no liability of the first Defendant (hirer) for the appellant (guarantor) to make good under the terms of his guarantee.

[65] Since there was no proper demand made of the whole amount under the alleged HP Agreements neither was the instalment in arrears claimed, the court is of the view that the plaintiff's claim against the defendants is bad and ought to be dismissed.

[66] Further, the terms of the alleged HP Agreements had been substantially varied by the plaintiff without the consent of the 2nd and 3rd defendants, as guarantors, with the result that the 2nd and 3rd defendants were discharged of their liability under the letter of guarantee.

[67] By a letter of offer dated 19 December 1995 issued by the plaintiff, under cl. 11.2, it was stipulated as a condition precedent for drawdown of the loans that the paid up capital of the 1st defendant shall be "not less than RM500,000."

[68] By exh. "P3", which is a report by the registrar of companies dated 10 September 1997, it was revealed that the paid up capital of the 1st defendant remained at RM250,000 only. It is pertinent to note that this ROC report was issued as a result of a search conducted by plaintiff's solicitors at the plaintiff's instruction on 10 September 1997 and that it was done after full disbursement of the loans under both the Ponysaw and Resaw accounts in year 1996.

[69] By disbursing the loans when it is clear that the paid up capital of the 1st defendant was never increased to RM500,000 as stipulated by cl. 11.2 of the letter of offer, the plaintiff would have waived the condition precedent for disbursement thereby varying the terms of the alleged HP Agreement to the detriment of the 2nd and 3rd defendants as the guarantors. And since it was not proven that the plaintiff had obtained the prior consent of the 2nd and 3rd defendants before varying this important term of the alleged HP Agreement, the 2nd and 3rd defendants are discharged of their liability under the guarantee.

[70] In *Kidurong Land Sdn Bhd & Anor v. Lim Gaik Hua Ors* [1990] 1 CLJ 687; [1990] 1 CLJ (Rep) 141 the Supreme Court ruled as follows:

> The onus of proving that the surety consented to the alterations of the contract is upon the party seeking to enforce the guarantee.

A

> We agree with the learned judge that the variations were material but differ with him on the consequence of the variations. We consider that the effect of the variations were such as to discharge the third appellant Ling from his obligations in respect his obligation in respect of the Taman Fairway and the Taman Hilltop Guarantees.

B **[71]** The court also finds that there was no offer made by the plaintiff, as the owner, to the 2nd and 3rd defendants, as guarantors, to purchase the subject machineries under the alleged HP Agreements and, accordingly, the plaintiff's claim against the 2nd and 3rd defendants, as guarantors is premature and must fail.

C

[72] In *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619 the Court of Appeal ruled as follows:

> If this opportunity to purchase the goods is not given to the guarantor, the claim by the owner against the guarantor will fail. Compliance with
D the proviso is a condition precedent to exercising the rights relied on by the owner against the guarantor.

[73] In the present case, the plaintiff's own evidence (through PW1 and PW3) clearly indicates that there was no offer made by the plaintiff to the 2nd and 3rd defendants to take over the subject machineries. The
E following are what they said:

> PW 1 – I've no idea whether the Plaintiff had made an offer to the Defendant 2 & 3 to purchase the machinery. Defendant 2 & 3 are the guarantors for Defendant 1. Personally 1 don't know whether Plaintiff had offered Defendant 2 & 3 to
F purchase the machinery even after the Writ was filed in Court. I can't recall whether there is any document or letter sent to Defendant 2-3 to offer them to purchase the machinery.

> PW 3 - I'm not aware any of my colleague had searched for buyer
G for these machinery. I'm not aware of any offer made to the Defendant 2 & 3 as guarantor to take over the machinery.

[74] The plaintiff had also failed to prove its case as even the certificates of indebtedness purportedly issued by the plaintiff pursuant to the alleged HP Agreement were defective.

H

[75] It was expressly admitted by the plaintiff in exhs. "P8A" and "P8B" that there were payments made by the 1st defendant to the plaintiff on respectively 31 October 1997, 31 December 1997 and 13 May 1998.

I

[76] In this respect, PW1 testified that the total amount paid as recorded in exh. "P8A" was RM15,636 in respect of the Resaw account whereas the total amount paid as recorded in exh. "P8B" was RM140,700 in respect of the Ponysaw account.

[77] It is to be noted that at p. 3 of the amended statement of claim under the column "Yang dibayar", the amount of instalments paid was expressed to be RM527,625 in respect of the Ponysaw account but in the certificate of indebtedness prepared by the plaintiff on 3 May 2005 or thereabout, under the column "less installment paid", the total instalments paid was expressed to be RM457,275 only.

[78] How could it be possible that the total amount of instalments paid by the 1st defendant be reduced from RM527,625 as at the date of the amended statement of claim, namely 20 April 1999 to RM457,275 as at the date of the certificate of indebtedness namely 3 May 2005, particularly when it was admitted by the plaintiff that there were further payments by the 1st defendant in the total sum of RM140,700 in respect of this Ponysaw account?

[79] Similarly, at p. 4 of the amended statement of claim, under the column "yang dibayar", the amount of instalments paid was expressed to be RM58,635 in respect of the Resaw account but in the certificate of indebtedness prepared by the plaintiff on 3 May 2005 or thereabout, under the column "less installment paid", the total instalments paid was expressed to be RM50,817 only.

[80] Again, how could it be possible that the total amount of instalments paid by the 1st defendant be reduced from RM58,635 as at the amended statement of claim, namely 20 April 1999 to RM50,817 as at the date of the certificate of indebtedness, namely 3 May 2005, particularly when it was admitted by the plaintiff that there were further payments by the 1st defendant in the total sum of RM15,636 in respect of this Resaw account?

[81] These discrepancies clearly shown that the two certificates of indebtedness prepared by the plaintiff on 3 May 2005 or thereabout (exhs. "P5A" and "P5B"), and contain manifest errors, were defective and certain manifest errors and accordingly, could not have been conclusive evidence of the 1st defendant's indebtedness.

[82] And there being no further evidence led by the plaintiff during the trial to show the amount owing by the 1st defendant, the plaintiff must be taken as having failed to prove its claim and, accordingly, the plaintiff's claim against the 2nd and 3rd defendants ought to be dismissed.

Conclusion

[83] On the balance of probabilities, the court is satisfied that the plaintiff has failed to prove its claim against the 2nd and 3rd defendants, and accordingly, the plaintiff's claim against the 2nd and 3rd defendants be dismissed with costs.